

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 06-01150

ADVERSARY PROCEEDING NO: 06-80115

ORDER TO ABSTAIN AND REMAND

The relief set forth on the following pages, for a total of 10 pages including this page, is hereby ORDERED.

FILED BY THE COURT
07/21/2006



Entered: 07/21/2006

US Bankruptcy Court Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:)	CHAPTER 7
)	
Bobby Gene Salinas and Cindy)	Case No. 06-01150-dd
Dianne Salinas,)	
)	
Debtors.)	
)	
Ernestine B. Corley and Brenda Keisler as)	Adv. Pro. No.: 06-80115-dd
Personal Representative of the Estate of)	
James W. Corley,)	
)	
Plaintiffs,)	
)	
vs.)	
)	ORDER TO ABSTAIN AND REMAND
Bob Salinas; Salinas Financial Associates,)	
dba Salinas Associates, Family Trust ;)	
Senior Information Services and Salinas &)	
Associates; American Telecommunications)	
Company, Inc., dba ATC, Inc. and Alpha)	
Telcom, Inc.; Family Heritage Estate)	
Portfolio, Inc.; American Investors Life)	
Insurance Company, Inc.; Mobile Cash)	
Systems, LLC; Senior Education Centers,)	
Inc., dba Senior Education Center of)	
America; Resort Holdings International,)	
LLC, dba Resort Holdings; HFG, Inc., dba)	
Hayes Financial Group, Inc., HFG and ETS)	
Payphones, Inc.; Sunshine Real Estate)	
Corporation; and AquaDyn Technologies,)	
Inc.,)	
)	
Defendants.)	

This matter comes before the court on the Motion to Remand filed by Brenda Keisler, as the Personal Representative for the estate of Ernestine B. Corley and the estate of James W. Corley ("Plaintiffs") in response to the Notice of Removal filed by American Investors Life Insurance Company, Inc. ("Insurance Company"). A hearing on this matter was held on July 18, 2006 and counsel for the Plaintiffs and counsel for the Insurance Company appeared. The Court has reviewed the pleadings and has considered the arguments of counsel, the exhibits and the proffered testimony and has determined to exercise its discretion and abstain and alternatively to

remand the litigation to state court on equitable grounds. In support of that determination, the Court makes the following findings of fact and conclusions of law.¹

FINDINGS OF FACT

1. On June 22, 2004, Ernestine B. Corley and Brenda Keisler as the Personal Representative of the Estate of James W. Corley² filed suit against Bob Salinas (“Debtor”) and a number of other defendants (together, the “State Court Defendants”),³ one of whom is the Insurance Company, in a suit designated 2004-CP-32-2255 (“the State Court Litigation”) in Lexington County, in the Court of Common Pleas for the Eleventh Judicial Circuit, South Carolina (the “State Court”).

2. Immediately thereafter, on June 22, 2004, James E. Corley, Jr.; Brenda J. Keisler, Elizabeth D. Griggs; Sandra P. Stevenson; Richard A. Corley, Debra R. Corley and Emily Hall filed suit against the same State Court Defendants,⁴ one of whom is the Insurance Company, in a suit designated 2004-CP-32-2256, in Lexington County, in the Court of Common Pleas for the Eleventh Judicial Circuit, South Carolina.

3. Both of the complaints in the state court litigation (the “State Court Complaints”) contain similar allegations and causes of action (That the Debtor advised the elderly Corleys, who are now deceased, and the rest of the State Court Plaintiffs, to take their life savings, invested in secure, stable investments, and invest them in companies which were defunct, bankrupt or in receivership.). The State Court Complaints allege a connection between Debtor and the Insurance Company. The State Court Complaints contain the following causes of action:

- a. Negligence;
- b. Fraud;
- c. Constructive Fraud;

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

² During the course of the litigation, Ernestine B. Corley died and her estate is one of the Plaintiffs.

³ Bob Salinas; Salinas Financial Associates dba Salinas Associates, Family Trust, Senior Information Services and Salinas & Associates; American Telecommunications Company, Inc., dba ATC, Inc. and Alpha Telcom, Inc.; Family Heritage Portfolio, Inc.; American Investors Life Insurance Company, Inc.; Mobile Cash Systems, LLC; Senior Education Centers, Inc., dba Senior Education Center of America; Resort Holdings International, LLC dba Resort Holdings; HFG, Inc., dba Hayes Financial Group, Inc., HFG and ETS Payphones, Inc.; Sunshine Real Estate Corporation; and AquaDyn Technologies, Inc.

⁴ Bob Salinas; Salinas Financial Associates dba Salinas Associates, Family Trust, Senior Information Services and Salinas & Associates; American Telecommunications Company, Inc., dba ATC, Inc. and Alpha Telcom, Inc.; Family Heritage Portfolio, Inc.; American Investors Life Insurance Company, Inc.; Mobile Cash Systems, LLC; Senior Education Centers, Inc., dba Senior Education Center of America; Resort Holdings International, LLC dba Resort Holdings; HFG, Inc., dba Hayes Financial Group, Inc., HFG and ETS Payphones, Inc.; Sunshine Real Estate Corporation; and AquaDyn Technologies, Inc.

- d. Breach of Fiduciary Duty;
- e. Breach of Contract Accompanied by a Fraudulent Act;
- f. Unfair Trade Practices; and
- g. Negligent Misrepresentation.

4. The State Court Complaints request a jury trial. The State Court Plaintiffs do not consent to a jury trial in the Bankruptcy Court.

5. The State Court Litigation progressed through various pleadings and discovery, including written discovery and several depositions.

6. The State Court Litigation was on the court docket since June 2004. It appeared on court rosters several times and the State Court was advised that it was ready for immediate trial.

7. Nancy Ellis, Deputy Clerk of Court in Lexington County, indicates that the case is subject to being called for trial at any time and that the State Court Litigation would likely have been tried if this bankruptcy had not intervened.

8. The bankruptcy of Bobby Gene Salinas and Cindy Dianne Salinas was filed on March 24, 2006 (Case Number 06-01150) (the “Bankruptcy”).

9. The Chapter 7 Trustee of the Bankruptcy conducted an examination of the Debtor pursuant to FRBankP 2004. On June 20, 2006, the Trustee filed a Report of No Distribution, indicating that there is no property available for distribution from the estate and that the estate has been fully administered. He abandoned all scheduled assets and asked that he be discharged as trustee.

10. On June 9, 2006, the Insurance Company filed a Notice of Removal of the State Court Litigation pursuant to 28 U.S.C. §1452.

11. On June 19, 2006, the Plaintiffs file a Motion to Remand, seeking to return the State Court Litigation to the State Court for jury trial. They assert that the State Court Litigation should be remanded pursuant to 28 U.S.C. §1452(a), in that it was improperly removed; pursuant to 28 U.S.C. §1452(b) in that equitable grounds exist for remand; pursuant to 28 U.S.C. 1334(c)(1) as a result of discretionary abstention and pursuant to 28 U.S.C. §1334(c)(2) as a result of mandatory abstention.

CONCLUSIONS OF LAW

The Insurance Company has removed the case from state court to bankruptcy court pursuant to 28 U.S.C. §1452, which provides that a party may remove a case to district court “if

such district court has jurisdiction of such claim or cause of action under §1334 of this title” (emphasis added). 28 U.S.C. §1334(b) provides that “... the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”

The Insurance Company asserts that the removal is appropriate because the State Court Litigation is “related to” Title 11. In considering the question of “related to” jurisdiction, this Court adopts the broad definition provided in A.H. Robbins Co. Inc. v. Piccinin, 788 F2d 994 (4th Cir. 1986):

An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Application of this definition requires a determination as to whether the State Court Litigation would affect the handling and administration of the bankrupt estate. Since the Notice of Removal was filed, the Chapter 7 trustee has determined that the Bankruptcy has no assets. He has filed a Report of No Distribution, indicating that diligent inquiry into the assets of the estate has indicated that there are no assets available for distribution. He has abandoned all scheduled assets and asked that he be discharged. It thus appears that the State Court Litigation will have no impact upon the handling or administration of the bankruptcy estate, because there is no bankruptcy estate to handle or administer.

Because the definition provided by the Fourth Circuit Court of Appeals is very broad, it could be construed to include the State Court Litigation. In addition, the Chapter 7 trustee’s determination as to the lack of assets was not made until after the State Court Litigation was removed. Therefore, this Court chooses not to remand on that basis alone but has also considered whether it should abstain pursuant to 11 U.S.C. §1334(c)(1) and whether remand is appropriate pursuant to 11 U.S.C. §1452(b).

Abstention Pursuant to 11 U.S.C. §1334(c)(1)

28 U.S.C. §1334(c)(1) provides for abstention of the Bankruptcy Court in the interest of justice or in the interest of comity with State Court or respect for State Law, in proceedings arising under Title 11 or arising in or related to a case under Title 11.

Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with

State Courts or respect for State Law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. §1334(c)(1).

In reviewing the provisions of §1334(c)(1), Courts have considered each of the disjunctive factors in determining whether discretionary abstention is warranted in any given case.

...discretionary abstention is permitted (1) where abstention is in the interests of justice; (2) where abstention is in the interest of comity with state courts, or (3) out of respect for concurrent state law. The three bases are disjunctive and the court need only consider one of three as the basis of its conclusion.

In re Dunes Hotel Associates, 94-75715-W, C-95-8223 (Bankr.D.S.C. 7/11/96); In re Bellucci, 119 B.R. 763, 772 (Bankr. E.D.Ca. 1990); In re Kolinsky, 100 B.R. 695, 705 (Bankr. S.D.N.Y. 1989).

In considering discretionary abstention, the South Carolina Bankruptcy Court has specifically adopted the factors proposed by the court in In re Republic Reader's Serv., 81 B.R. at 429:

1. The effect or lack thereof on the efficient administration of the estate if a Court recommends abstention;
2. The extent to which state law issues predominate over bankruptcy issues;
3. The difficulty or unsettled nature of the applicable state law;
4. The presence of a related proceeding commenced in state court or other nonbankruptcy court;
5. The jurisdictional basis, if any, other than 28 U.S.C. §1334;
6. The degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
7. The substance rather than form of an asserted "core" proceeding;
8. The feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;
9. The burden of the bankruptcy court's docket;
10. The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
11. The existence of a right to a jury trial; and
12. The presence in the proceeding of nondebtor parties.

In re Dunes Hotel Associates, 94-75715-W, C-95-8223 (Bankr.D.S.C. 7/11/96); In re Landmark Land Co., Case No. 91-5817, Adv. No. 2:91-5290-1 (D.S.C. 1994).

Application of these factors to the State Court Litigation indicates that discretionary abstention should be exercised.

1. The Bankruptcy is a No Asset Chapter 7. A determination of the State Court Litigation in State Court will greatly facilitate and expedite the determination of the issues in that litigation and will not hamper or affect the ongoing bankruptcy estate in any way. This factor indicates abstention.

2. The State Court Litigation was filed almost two years prior to the Bankruptcy. It has progressed pursuant to the state procedures and the parties have pursued written discovery and depositions in state court. It has appeared on the state court roster numerous times and the parties have indicated to the state court that they are ready for trial. The United States Court of Appeals for the Fourth Circuit has considered Congressional Intent in determining whether matters involving issues of state law should be determined in a bankruptcy forum.

Congress has indicated a strong preference for allowing state law claimants to litigate their disputes in state courts rather than the bankruptcy courts.

In re Steingold Cos., 960 F.2d 147 (Table), 1992 WL 81677 at *1 (4th Cir. 1992).

This factor indicates abstention.

3. While the state law issues raised are not particularly difficult or unsettled, this Court believes that the progress in State Court for two years weighs heavily in favor of allowing a determination in State Court, where trial is imminent.

Where a cause of action for monetary damages based primarily on state law can be litigated in state court without substantial delay and disruption to the orderly administration of the estate, the best forum for resolution of that action is state court, irrespective of whether the legal issues present unsettled questions of state law.

In re Republic Reader's Serv., Inc. 81 B.R. 422, 426 (Bankr.S.D.Tex.1987).

This factor indicates abstention.

4. There is related litigation in State Court, which has also been removed. There are also two probate estates that remain open in Lexington County, pending the outcome of the State Court Litigation. This factor indicates abstention.

5. There is no jurisdictional basis for trial in the Bankruptcy Court, other than §1334. There is no federal subject matter jurisdiction or diversity jurisdiction. This factor indicates abstention.

6. The State Court Litigation is not directly related to anything that will occur in the ongoing Chapter 7 bankruptcy. This factor indicates abstention.

7. The Insurance Company admits that the State Court Litigation between itself and the Plaintiffs is at best “related to” the Bankruptcy. There is no core proceeding, in form or substance. This factor indicates abstention.

8. Severance is not indicated since no core proceeding is involved. This factor indicates abstention.

9. The calendar of the Bankruptcy Court has been burdened recently by the Bankruptcy Reform Legislation that has substantially changed many of its procedures and has necessitated additional proceedings in compliance with its requirements. This Court believes that the most expeditious method of obtaining a final result in the State Court Litigation would be trial in the State Court. This factor indicates abstention.

10. I make no finding of forum shopping.

11. All parties have recognized that this matter is to be tried by a jury. Because of the legal nature of the causes of action in the State Court Litigation, the Plaintiffs are constitutionally entitled to a jury trial. This factor indicates abstention.

12. The State Court Litigation involves many non debtor parties. Many of the Plaintiffs are elderly and two are represented by probate estates. In addition, the Plaintiffs have been required to obtain bankruptcy counsel in addition to their regular counsel, increasing the fees and expenses in the litigation. The inconvenience to these non debtor parties in requiring them to participate in a new forum would constitute prejudice in favor of abstention.

In summary, almost every factor of the discretionary abstention test indicates that the Court should exercise its discretionary abstention and remand the State Court Litigation for determination in state court. It does not appear to this Court that the interests of justice are best served by allowing a bankruptcy filed on the eve of trial to further delay a case that would have been tried by jury by now if not for this filing. The interests of comity with the state courts and respect for state law, together with the consideration of judicial efficiency, indicate that abstention is appropriate.

Remand Pursuant to 11 U.S.C. §1452(b)

Abstention by this Court means that the case will be remanded back to the state court for trial. Even if this Court had not abstained pursuant to 11 U.S.C. §1334(c)(1), it would have been persuaded by the argument for remand pursuant to 28 U.S.C. §1452(b), which provides:

The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise any the court of appeals under §15(d), 1291 or 1292 of this title or by the Supreme Court of the United States under §1254 of this title (*emphasis added*).

While the equitable grounds supporting remand are not specified in the statute, there are numerous instances in case law that provide examples of situations justifying remand. Generally, courts consider “judicial economy, comity and respect for state court capabilities, and the effect on the administration of the estate.” In re Olympia Holding Corporation, 215 B.R. 254, 256 (Bankr. M.D. Fla. 1997). Such analysis can include the following factors:

1. The effect on the efficient administration of the bankruptcy estate;
2. The extent to which issues of state law predominate;
3. The difficulty or unsettled nature of the applicable state law;
4. Comity;
5. The Degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
6. The existence of the right to a jury trial; and
7. Prejudice to the involuntarily removed parties.

Drexel Burnham Lambert Group, Inc. v. Vigilant Insurance Co., 130 B.R. 405, 407 (S.D.N.Y. 1991).

Many of the factors in the remand test are duplicative of the discretionary abstention test and they indicate that remand is appropriate.

1. As indicated above, the State Court Litigation will have no impact on the administration of the bankruptcy estate. Because the case has been determined to be a no asset case, there will be no claims against the Debtor. This factor indicates remand.

2. The causes of action in the State Court Litigation are all tort and contract causes of action arising under state law. This factor indicates remand.

3. While the issues raised may not be particularly difficult or unsettled, they are state law issues and are better resolved in a state law forum. This factor indicates remand.

4. Comity with the state courts would indicate that the Bankruptcy Court should have respect for the procedures and orders of the state courts. Given that this case has been pending for two years, has undergone pleadings, motions, discovery and a pre trial conference and is ready for trial, comity would indicate that the Bankruptcy Court would allow the state court to finish the litigation. This factor indicates remand.

5. As shown above, the State Court Litigation has no real impact on the bankruptcy estate, which is a No Asset Chapter 7. The jurisdictional basis for removal is at best “related to” jurisdiction. This factor indicates remand.

6. All parties have recognized that this is a jury trial case and it is on the jury trial roster in state court. The Plaintiffs are entitled to a jury trial, given the legal nature of their causes of action. This factor indicates remand.

7. The Plaintiffs have shown some prejudice as a result of the removal. The litigation has progressed for two years. Retaining jurisdiction in bankruptcy court would mean that the nine state court plaintiffs would be required to try this case in a forum outside their county of residence, which would be inconvenient and time consuming, especially in light of the advancing age of the Plaintiffs. This factor would indicate remand.

Application of the factors in the remand test to the State Court Litigation indicates that remand is appropriate. There are numerous equitable considerations that persuade this Court that the State Court Litigation should be tried in its original forum.

Because the Court has determined these matters on the basis of 28 U.S.C. §1452(b) and 28 U.S.C. §1334(c)(1), it does not reach the issue of mandatory abstention in 28 U.S.C. §1334(c)(2).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court abstains from hearing this adversary proceeding, applying the discretionary abstention provisions of 28 U.S.C. §1334(c)(1) and that the Court remands the adversary proceeding to the Court of Common Pleas for the Eleventh Judicial Circuit, South Carolina pursuant to such abstention and pursuant to 28 U.S.C. §1452(b).

Columbia, SC
July 21, 2006